44170
EB

SERVICE DATE – OCTOBER 19, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 164X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN BONNE TERRE, MO.

Digest:[1] A petitioner, Asarco LLC, asks the Board to reopen a consummated abandonment, alleging that new evidence demonstrates that Union Pacific Railroad Company misrepresented public health and safety impacts when it sought abandonment authority. This decision denies the petition to reopen.

Decided: October 16, 2015

Union Pacific Railroad Company (UP) filed a verified notice of exemption to abandon a 1.1-mile line of railroad near Bonne Terre, Missouri, in this proceeding in 2000. The Board served and published the notice of exemption, and UP consummated the abandonment in 2001. On November 28, 2014, Asarco LLC (Asarco)[2] filed a petition to reopen this proceeding. Asarco claims that, in 2000, UP misrepresented to the Board that the abandonment would have no detrimental effects on public health and safety. It points to new evidence purportedly showing that the rail line was constructed with mining waste and is now releasing harmful materials into the environment. Asarco asks the Board to reopen the proceeding and investigate whether UP knew, or should have known, of the alleged detrimental effects on public health and safety upon abandonment of the line. Asarco also requests that the Board condition the abandonment on soil sampling and other environmental monitoring conditions and for UP to provide a report regarding the environmental condition of all other lines it abandoned in the area. As discussed below, Asarco has not justified reopening this proceeding. We will therefore deny its petition to reopen.

BACKGROUND

On November 30, 2000, UP filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 1.1-mile line of railroad between milepost 31.20 and milepost 30.10 in Bonne Terre, St. Francois County, Mo. Concurrently with its

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

[2] Asarco is primarily a copper mining, smelting, and refining company. See http://www.asarco.com/about-us/.

verified notice, UP submitted a Combined Environmental and Historical Report (Combined Report) concerning the environmental impacts of abandoning the line.[3] UP stated in the Combined Report that the abandonment "would have no detrimental effects on public health and safety." In fulfilling the Board's environmental reporting requirements at 49 C.F.R. § 1105.7(e)(7)(iii), UP also stated that "[t]here are no known hazardous material waste sites or sites where known hazardous material spills have occurred on or along the subject right-of-way."[4]

The Board served and published notice of UP's exemption in the Federal Register on December 21, 2000. After reviewing the Combined Report, the Board's Section of Environmental Analysis (SEA)[5] concluded that no environmental conditions pursuant to the National Environmental Policy Act (NEPA) needed to be imposed on the abandonment authority.[6] The Board therefore issued a Finding of No Significant Impact on February 12, 2001, allowing the exemption for abandonment to become effective without conditions. UP filed its notice of consummation on January 23, 2001, at which point the line ceased to be part of the national rail system. UP subsequently sold a portion of the land to the Bonne Terre Industrial Development Authority and another portion to the Egyptian Concrete Company. The remaining 0.4 miles were returned to a property owner who held a reversionary interest in the land.[7]

As explained in the record, by early 2000, Asarco was subject to significant environmental liability at various mining sites throughout the country pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675 (CERCLA), which imposes liability on persons responsible for releases of hazardous waste.[8] Asarco subsequently filed for bankruptcy, and, in 2009, it filed nearly a dozen civil lawsuits seeking contribution for its CERCLA liability against various entities, including UP. One of these cases was filed in the Eastern District of Missouri in connection with several separate environmental sites located in southeast Missouri. See Asarco LLC v. NL Indus., No. 4:11-CV-00864-JAR (E.D. Mo.). As part of its bankruptcy, Asarco paid approximately $80 million to settle its environmental and CERCLA-related liability for sites in this area with the United States and the State of Missouri.[9]

---

[3] The line was built in the nineteenth century, and UP acquired the line as part of its merger with the Missouri Pacific Railroad Company in 1997. See Combined Report (Asarco Pet. to Reopen (Nov. 28, 2014), Declaration of Gregory Evans in Support of Pet. to Reopen (Evans Dec.), Exhibit A) at 3; UP Reply (Dec. 18, 2014) at 4.

[4] Combined Report (Evans Dec. Ex. A) at 7.

[5] SEA is the predecessor to our Office of Environmental Analysis (OEA).

[6] NEPA requires federal agencies to consider the environmental impacts of proposed major federal actions and reasonable alternatives to those actions. The Board's environmental reporting requirements for abandonments are codified at 49 C.F.R. § 1105.7.

[7] See UP Reply at 6.

[8] See Asarco Pet. to Reopen at 2; UP Reply at 6.

[9] See Asarco Pet. to Reopen at 2; UP Reply at 6.

In 2013, as part of its CERCLA litigation seeking contribution from UP, Asarco's consultants collected three samples purportedly from along the abandoned line. According to Asarco, the samples demonstrate that the track ballast consisted of mining waste and that the ballast therefore contains elevated levels of lead, zinc, and cadmium.[10]

In its November 28, 2014 petition to reopen the abandonment proceeding, Asarco argues that these soil samples are new evidence that demonstrates that UP made a false statement when it claimed in 2000 that there would be no detrimental effects on public health and safety should abandonment be authorized. Asarco asks the Board to reopen the proceeding and investigate whether UP knew, or should have known, of the detrimental effects on public health in 2000, when it filed its notice of exemption. It further claims that any abandonment of the line should only be allowed subject to proper sampling and other environmental monitoring conditions that the Board deems appropriate. Lastly, Asarco asks that the Board require UP to provide a report regarding the environmental condition of all other abandoned lines it acquired from the Missouri Pacific Railroad Company in southeast Missouri.

UP filed its reply on December 18, 2014. UP argues first that the Board lacks jurisdiction to reopen the consummated abandonment or to order UP to prepare a report on the abandoned lines in southeast Missouri. Second, UP claims that Asarco has produced no evidence of any misrepresentations in UP's exemption filings, which, it states, were made with the full knowledge of the U.S. Environmental Protection Agency (EPA), Missouri environmental authorities, and the City of Bonne Terre. Third, UP argues that extraordinary prejudice would result from reopening a consummated rail line abandonment involving a parcel of land that has been conveyed to a third party. Fourth, UP asserts that Asarco does not have standing. Fifth, it claims that there is no reason for the Board to insert itself into the CERCLA litigation.

Asarco filed a response on January 7, 2015. It claims that UP committed a fraud against the Board when it submitted its 2000 notice of exemption. Asarco asserts that UP knew, or should have known, of the environmental contamination in Missouri at that time because, prior to seeking its abandonment exemption, UP entered into two consent decrees requiring it to remove contaminated ballast from lines built with mining waste in Idaho.[11] Asarco also asserts that UP has not refuted Asarco's evidence of contamination.

Asarco's January 7 response also challenges UP's claim that there was no misrepresentation in light of the involvement of federal and state environmental authorities in advance of UP filing its abandonment exemption.[12] Asarco argues that UP, not third-party agencies, had the burden to investigate the status of its lines prior to abandonment. UP,

---

[10] See Asarco Pet. to Reopen at 4-5.

[11] Asarco Reply at 10.

[12] The Board requires railroads seeking abandonment authority to consult with the agencies listed at 49 C.F.R. § 1105.7(b) and to certify to the Board that they have done so. 49 C.F.R. § 1105.7(c).

according to Asarco, should have placed those agencies on notice of prior activities on the line rather than allowing the agencies to rely on UP's misrepresentations.

Lastly, Asarco argues in its response that the Board does not preclude participation based on standing and that the Board should reopen this proceeding even though the Missouri CERCLA litigation is pending. According to Asarco, that litigation is separate from the questions before the Board, which concern misrepresentations made in one of the Board's own proceedings. Not to reopen based on this litigation, Asarco claims, would represent an impermissible attempt by the Board to delegate its responsibility to examine the environmental impacts of a rail line abandonment.

On January 27, 2015, UP replied, saying that Asarco's January 7 filing was an improper reply to a reply and should be rejected. UP also reiterates its positions that the Board lacks jurisdiction to reopen the abandonment, that Asarco lacks standing, and that Asarco has not produced evidence of fraud. UP argues that Asarco's attempt to use UP's consent decrees in Idaho as evidence of fraud in Missouri is misplaced.

PRELIMINARY MATTER

Asarco asserts that UP's December 18 filing was actually a motion to dismiss and that the Board should accept its January 7 filing as a reply to UP's motion. Should the Board not consider UP's December filing as a motion to dismiss, Asarco asks that the Board accept its January 7 response to UP's reply in light of the allegedly new arguments UP made in its December filing and the complex legal arguments presented there. While we do not agree that UP's December 18 filing amounted to a motion to dismiss or that UP raised new arguments in it, in the interest of a complete record we will accept Asarco's January 7 response and UP's January 27 response into the record.

DISCUSSION AND CONCLUSIONS

Asarco relies on 49 U.S.C. § 722(c), which gives the Board general authority to reopen a proceeding because of material error, new evidence, or substantially changed circumstances. In the case of an abandonment that has not yet been consummated, we can entertain a petition to reopen on grounds of material error, new evidence, or substantially changed circumstances (49 C.F.R. § 1152.25(e)(4)), or to vacate on grounds of significant procedural defects, such as the loss of a properly filed protest or the failure of an applicant to afford the public the requisite notice (49 C.F.R. § 1152.25(e)(6)). However, the Board does not have the same discretion to reopen and/or vacate an abandonment decision under 49 U.S.C. § 722(c) after any conditions that we have imposed are satisfied and the abandonment has been consummated. See Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) ("[U]nless the Commission [the Board's predecessor agency] attaches post abandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end").

In deciding whether to exercise our authority to reopen an abandonment that has been consummated, we must balance concerns of administrative finality, repose and detrimental

reliance with whatever factors favor reopening. See S.R. Investors, Ltd.—Aban. —Tuolumne Cty., Cal., AB 239X, slip op. at 5 (ICC served Jan. 26, 1988). For example, the Board has held that it has regulatory authority to reopen a consummated abandonment in the event of fraud, misrepresentation, or ministerial error. See Ill. Cent. Gulf R.R.—Aban.—DeWitt & Platt Ctys., Ill., 5 I.C.C. 2d 1054, 1063 (1988). See also CSX Transp. Inc.—Aban.—between Bloomingdale & Montezuma—in Parke Cty., Ind., AB 55 (Sub-No. 486), et al. (STB served Sept. 13, 2002), petition for review denied, Montezuma Grain Co. v. STB, 339 F.3d 535 (7th Cir. 2003); CSX Transp. Inc.—Aban.—in Summit Cty., Ohio, AB 55 (Sub-No. 631X) (STB served May 12, 2004), petition for review denied, Terminal Warehouse v. CSX Transp., No. 05-3788 (6th Cir. 2006). In performing the balancing described above, especially considering the amount of time that has passed since the abandonment has been consummated, we will apply the fraud, misrepresentation, or ministerial error standard here.

We will not reopen this proceeding because Asarco has failed to show that UP engaged in any fraud or misrepresentation when it filed for abandonment authority in 2000 and Asarco has not claimed any ministerial error. Pursuant to its obligations under 49 C.F.R. § 1105.7, UP filed an environmental report in 2000 stating that there were "no known hazardous material waste sites or sites where known hazardous material spills have occurred on or along the subject right-of-way."[13] To prove its allegation of fraud and support reopening of a consummated abandonment so many years after the fact, Asarco would have had to show that UP knew of any hazardous material sites that it did not disclose to the Board at the time the abandonment was pending.

Asarco has not demonstrated that UP knew of any contamination at the time of the abandonment. Asarco primarily bases its claim on sampling it collected in 2013 purportedly showing contamination on the line. Assuming that these samples came from the right-of-way, these sampling results from 2013 do not demonstrate that UP knew of the contamination when it sought abandonment authority in 2000. Similarly, the fact that UP has owned multiple lines in the area does not prove that "UP has been fully aware of the hazardous materials in the area."[14]

Asarco also argues that, because UP had already entered into two consent decrees related to contaminated rights-of-way in Idaho[15] by the time it sought to abandon the Bonne Terre line in Missouri, it therefore knew, or should have known, of the contamination of the Bonne Terre line. Asarco speculates that "Union Pacific would not have entered consent decrees paying to address the contamination of the very type at issue in this [proceeding] without becoming aware that the mining waste problem was present in all of its abandoned lines."[16] It does not follow, however,

[13] Combined Report (Evans Dec. Ex. A) at 7.

[14] Asarco Pet. to Reopen at 9.

[15] United States v. Union Pac. R.R, Civ. No. 95-0152-N-HLR (D. Idaho); United States v. Union Pac. R.R., Civ. No. 99-0606-N-EJL (D. Idaho).

[16] Asarco Response (Jan. 7, 2015) at 9.

that a situation involving lines in Idaho would alert UP to the alleged contamination on the Bonne Terre line in Missouri.[17]

Furthermore, UP's representation to the Board in 2000 that the right-of-way contained no known hazardous material waste sites was supported by its consultation with independent agencies. UP explains that, before it filed the notice of exemption, UP informed EPA and the Missouri Department of Natural Resources of its plan to abandon the Bonne Terre line. UP asked the agencies to identify any potential effects on the surrounding area and to provide any information on the location of any hazardous waste sites and known hazardous material spills on the right-of-way.[18] Neither agency informed UP of any environmental concerns with the proposed abandonment, even though the environmental authorities were aware of the nearby Bonne Terre Superfund Site at that time.[19]

Asarco argues that a fraud nevertheless occurred because UP had the responsibility to "diligently investigate" the line prior to filing its notice of exemption and notify environmental authorities of the findings when seeking their input. In other words, according to Asarco, UP "should have known" there was contamination in the rail line ballast. This claim, however, misconstrues UP's responsibility. Under the Board's regulations, UP was required to submit an environmental report identifying known hazardous waste sites or sites where there have been known hazardous material spills on the right-of-way.[20] It was also required to consult with all appropriate agencies in preparing its report and give them sufficient notice to allow them to provide input.[21] Here, UP's environmental report contained all of the information required by the Board's regulations, including evidence that it properly consulted with the appropriate agencies prior to submitting its report. Asarco has presented no evidence to the contrary. Thus, UP complied with the requirement in our environmental rules that railroads disclose known hazardous waste sites (i.e., hazardous waste sites of which the railroads have actual knowledge) on lines subject to abandonment.

In short, Asarco has presented no evidence that UP was aware of any of the alleged contamination discovered on the line in 2013 when it sought abandonment authority in 2000.[22] Moreover, Asarco has not demonstrated that UP engaged in any fraud or misrepresentation. We

[17] Moreover, as UP notes, both consent decrees provide that the decrees are inadmissible in any judicial or administrative proceeding against UP as proof of liability or as an admission of any fact dealt with in the decrees. UP Response (Jan. 27, 2015) at 9.

[18] See UP Reply VS Allamong at 1; Combined Report (Evans Dec. Ex. A) at Attachment 2.

[19] See UP Reply at 5 & VS Allamong at 1.

[20] See 49 C.F.R. § 1105.7(e)(7)(iii).

[21] See 49 C.F.R. § 1105.7(c).

[22] In light of our decision to deny Asarco's petition to reopen, we need not address UP's argument that Asarco lacks standing to seek reopening.

will therefore deny its petition to reopen the proceeding. The proper forum to resolve UP's liability under CERCLA, if any, is before the district court in Missouri.[23]

It is ordered:

1. Asarco's petition to reopen is denied.

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

[23] Whether a rail line has been abandoned or not under the Interstate Commerce Act does not affect whether a railroad could be liable under CERCLA. The strict liability provisions of CERCLA, contained in 42 U.S.C. § 9607(a), attach liability to parties that formerly owned or operated a facility at the time of disposal of the hazardous substance(s). Thus, the fact that a railroad has consummated abandonment of a line pursuant to Board authority does not affect whether a railroad could be considered a potentially responsible party under CERCLA.